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June 16, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: GN Docket No. 93-252:
Reconsideration of Second Report and Order

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and four copies of the "Opposition of the Bell Atlantic Companies to Petitions for Reconsideration" of the Commission's Second Report and Order (FCC 93-41, released March 7, 1994) in the above-referenced proceeding.

Should you have any questions with regard to this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc: John Cimko, Jr.
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Nancy Boocker
David Furth

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

OPPOSITION OF THE BELL ATLANTIC COMPANIES TO PETITIONS FOR RECONSIDERATION

THE BELL ATLANTIC COMPANIES

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Their Attorneys

Dated: June 16, 1994

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SUMMARY

The Commission's Second Report and Order in this proceeding correctly took the first steps to implement new Section 332 of the Communications Act. It properly resolved numerous issues including the scope of CMRS and classification of services under Section 332. The few objections to the Order which have been filed as petitions for reconsideration either repeat arguments made and rightly rejected by the Order, or raise issues that are beyond the scope of this particular rulemaking. The Commission should reaffirm its decisions as to those issues, and deny the petitions for reconsideration.

Definition of CMRS. One petitioner challenges the Order's definition of CMRS and advocates an approach that would carve out various commercial mobile service providers from the new, unified regulatory regime. The Commission correctly refused to take that approach, determining that a comprehensive CMRS definition best achieved Congress's purpose in new Section 332.

Forbearance from Tariffing. Two petitioners object to the Order's decision to forbear from enforcing the tariff provisions of Section 203 of the Act on CMRS providers. Their arguments, however, were made before and were properly rejected, or are based on conclusory assertions not supported by the record. In addition, the Order made each of the findings required by Section 332 for forbearance. Those findings are fully grounded in the extensive rulemaking record, and are consistent with the decisions of nearly all states not to tariff mobile services. The record

demonstrates that CMRS tariffing is not only unnecessary to guard against unjust or unreasonable rates or to protect consumers, but that it would likely discourage and impede competition among CMRS providers.

Interconnection. Four petitioners raise concerns about the Order's treatment of CMRS interconnection. These issues are, however, being taken up in another proceeding. The Commission properly determined that the factual record in this initial CMRS rulemaking on the complex issues as to CMRS interconnection was too conflicting to provide a sufficient basis to act, and that the record should be supplemented by a new rulemaking focused on interconnection issues.

State Petitions. Two petitioners request changes in the Commission's new rules governing petitions by states to maintain or adopt rate regulation of CMRS. But those rules accurately track Section 332, and faithfully implement that statute's purposes. They should not be revised.

The Order is, as the Commission acknowledges, only a first step toward implementing the regulatory symmetry goals of Section 332. It is important that the Commission promptly dispose of these petitions for reconsideration, so that it can devote its attention to harmonizing the many disparities in the rules which still govern different commercial mobile services, and achieve a consistent, unified regulatory structure for the entire industry.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

OPPOSITION OF THE BELL ATLANTIC COMPANIES TO PETITIONS FOR RECONSIDERATION

The Bell Atlantic Companies, by their attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby oppose certain petitions for reconsideration of the Commission's Second Report and Order in this proceeding (FCC 94-31, released March 7, 1994) ("Order").

INTRODUCTION

The Order is an important first step in implementing the two goals of new Section 332 of the Communications Act: (1) to achieve "regulatory symmetry" among commercial mobile radio services, and (2) to "forbear" from enforcing provisions of the Act which impose unnecessary regulatory burdens. Bell Atlantic strongly supports the Commission's recognition of the need for consistent regulation of CMRS, and its efforts to identify provisions which are appropriate for forbearance. Its resolution of key issues as to the scope of CMRS and the benefits of forbearance was fully warranted by the rulemaking record.

The few objections to the Order which have been filed focus on four issues: (1) the definition of CMRS, (2) forbearance from tariffing, (3) interconnection, and (4) the state petition process. These objections either reiterate arguments that were properly rejected or raise issues that are beyond the scope of the Order. Many of them would reverse the Order's strides toward parity. The Commission's treatment of each of these issues was fully grounded in the language of the Communications Act and in the rulemaking record.

It is also important that these objections be quickly denied so that the Commission can focus on implementing real parity among mobile services. The Order laid the right groundwork for moving toward symmetry. But there remain significant inequalities in regulation both among providers of different services, and even among providers of a single service.[1/] The Commission has begun rulemakings to address some of these inequalities.[2/] It has committed to examine others, but has not yet taken formal

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1/ For example, Bell Atlantic's cellular operations are burdened, unlike competing CMRS carriers, by the structural separations rule (Section 22.901), equal access obligations, restrictions on types of CMRS service they can provide, and coverage limits smaller than the areas which can be served by wide-area SMR and PCS carriers.

2/ Further Notice of Proposed Rulemaking in GN Docket No. 93-252 (FCC 94-100, released May 20, 1994) ("CMRS Transition NPRM"); Notice of Proposed Rulemaking in GN Docket No. 94-33 (FCC 94-101, released May 4, 1994) ("CMRS Further Forbearance NPRM"); Notice of Proposed Rulemaking in CC Docket No. 94-54 (adopted June 9, 1994)("CMRS Equal Access/Interconnection NPRM").

action.[3/] Bell Atlantic appreciates the substantial efforts of Commission staff being devoted to CMRS. Those resources should not be diverted from these follow-on proceedings by revisiting issues that the Order properly and thoroughly dealt with. The priority now should be to replace the current balkanized regulation of mobile services with a unified system.

To that end, Bell Atlantic will address here only the four principal objections which have been raised to the Order. It does support a number of the specific proposals for clarification or for further action which various parties have filed, and urges the Commission to address them in the follow-on proceedings. In particular, it strongly urges the Commission to move quickly to repeal Section 22.901, the "structural separations" rule, and joins Ameritech's request for a rulemaking on that provision.[4/]

3/ The Commission has committed to reexamine the validity of Section 90.603(c), which prohibits telephone company ownership of SMR systems, CMRS Transition NPRM at ¶ 89 n. 169, and the prohibition on dispatch services by cellular carriers, Order at ¶ 285. Both of these restrictions only frustrate new competition and serve no public interest need.

4/ Because Section 22.901 regulates only some but not all CMRS services and, worse, only some but not all carriers within one service, it is flatly inconsistent with the principle of symmetry. In the PCS rulemaking, the Commission did not impose separations burdens on BOC PCS affiliates but left them in place on BOC cellular affiliates. As Bell Atlantic demonstrated (Comments at 36-38), there is no basis for retaining that rule. It is an anachronism whose original purposes, even if still valid, are met by Parts 32 and 64 of the Commission's Rules. In the Order the Commission committed to a separate proceeding on Section 22.901 and other safeguards, recognizing that "the issue of regulatory symmetry in the application of these safeguards is an important one." (Order at ¶ 219.) That proceeding is important if Section 332's symmetry goals are to be met.

Bell Atlantic also supports the positions of the Personal Communications Industry Association and GTE Service Corpora-

In this proceeding, the Commission should promptly dispose of the objections so that it can move toward taking the other actions which will give real force to Congress's parity mandate.

I. THE COMMISSION'S DEFINITION OF CMRS WAS CORRECT.

Alone among the petitioners for reconsideration, the American Mobile Telecommunications Association challenges the Commission's definition of CMRS, arguing that it was overly broad. AMTA requests that CMRS exclude "small entities."

The Commission's decision not to adopt a definition of CMRS based on carrier size or capacity is, however, soundly based on new Section 332, which defines CMRS in terms of the service that is being provided, not the size of the carrier. Congress nowhere provided for or implied any exemption for small carriers. AMTA's position is bereft of a basis in the Act or in its legislative history, and AMTA does not point to any such basis.

AMTA merely reargues its earlier position that small-capacity carriers be exempted from the CMRS classification. That position obtained little support from other commenters and was properly rejected by the Order, which held it "would undermine the plain meaning of the statute, and Congress's intent in passing it.

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tion that the CMRS industry should not be burdened by the requirements of TOCSIA. Forbearance from TOCSIA is under active consideration in the CMRS Further Forbearance NPRM. And Bell Atlantic supports GTE's request that several disparities between the rules for cellular and PCS should be removed. This is either being addressed in new CC Docket No. 94-46 (FCC 94-113, released June 9, 1994), or can be addressed in the CMRS Transition NPRM, which seeks to harmonize the rules for various services.

Although a service has low system capacity, it may nonetheless be available 'to the public'." (Order at ¶ 69.) Similarly, a "small entity" can offer service "to the public" and thus be CMRS.

In addition, as many commenters pointed out, imposing a size-based distinction on regulation would be unworkable and would embroil the Commission in constant policing of carriers. (See Bell Atlantic Comments at 10-12.) Moreover, as the Commission found, it would discourage carriers from expanding their offerings to avoid exceeding the size "trigger" and would thereby disserve the public. (Order at ¶ 70.)

AMTA's analogy to the "small business" test for preferences in the Commission's new competitive bidding rules (Petition at 6) is misguided. That test, which was designed to encourage the participation of small businesses in seeking new licenses, is irrelevant to the purpose of defining CMRS -- to bring all carriers offering for-profit interconnected service to the public within a unified regulatory regime.

AMTA appears to object primarily to the burdens which Title II regulation may impose disproportionately on small carriers. (Petition at 7-11.) That issue is, however, being addressed in the Further Forbearance NPRM. The specific scope of forbearance is not pertinent to the issue of defining what qualifies as CMRS.

AMTA's proposed change would, were it adopted, seriously undermine parity, by carving out an essentially indeterminate and ever-changing class of carriers from CMRS status, even though those carriers are offering service to the public in competition with other carriers. Its petition should be denied.

II. THE COMMISSION'S DECISION TO FORBEAR FROM SECTION 203 WAS FULLY SUPPORTED BY THE RECORD.

Out of the more than 70 parties participating in this proceeding, only two, the National Cellular Resellers Association and MCI Telecommunications Corporation, object to the Commission's decision to forbear from imposing the tariffing obligations of Section 203 on CMRS providers. Their petitions, however, rely on conclusory assertions which fail to undercut the substantial record warranting tariff forbearance. They should be denied.[5/]

Section 332(c)(1) of the Act authorizes the Commission to forbear from provisions of Title II (other than Sections 201, 202 and 208) if it finds that three conditions exist.[6/] The Commission acknowledged that it must analyze each of these statutory conditions (Order at ¶ 125), and, in an extensive analysis based on the rulemaking record (¶¶ 126-178), determined that each was in fact satisfied.

5/ MCI, who now attacks the Order's forbearance findings, did not address forbearance at all in its comments. Even when others' initial comments established a solid record for forbearance, MCI did not bother to criticize that record in its reply comments. One cannot help but wonder if MCI's new-found outrage over forbearance for cellular carriers may be motivated by its recent alliance with Nextel to compete against cellular carriers.

6/ Section 332(c)(1)(A) requires that, to forbear from a particular Title II provision, the Commission must find that "(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest."

First, the Commission concluded that tariffs were unnecessary to guard against unjust or unreasonable rates and practices, meeting the Section 332(c)(1)(A)(i) standard. (Order at ¶ 174.) It relied on a record in which there was near-unanimity in favor of tariff forbearance. This consensus was buttressed by detailed evidence in this record, and in the record of other proceedings, that tariff regulation was not necessary to ensure against unjust or unreasonable rates and practices of carriers. Most of that evidence concerned the cellular industry. It included formal findings by the Commission in other recent proceedings as to the level of competition in the industry,[7/] decisions by several state commissions that competition existed and that tariff regulation of cellular service was unwarranted,[8/] and an affidavit by an economist with extensive experience in studying cellular markets that tariff regulation not only served no valid purpose but was in fact

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7/ "It appears that facilities-based carriers are competing on the basis of market share, technology, service offerings, and service price." Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992).

See also the record of comments submitted in response to the Petition for Rulemaking of the Cellular Telecommunications Industry Association, RM-8179, incorporated into this record (Notice of Proposed Rulemaking at ¶ 63); CTIA Comments at 25-34; CTIA Reply Comments at 3-10.

8/ Both the North Carolina Public Utilities Commission and the Maryland Public Service Commission, for example, concluded that tariff regulation was unnecessary to protect the public interest given the level of competition in the industry. North Carolina found that "the provision of cellular service in North Carolina is competitive" and that tariffing was unnecessary. Maryland found, "Evidence confirms that the cellular telephone providers operating in Maryland are acting competitively by improving service and lowering prices." See Bell Atlantic Comments, Appendices 1 and 3.

harmful to consumers.[9/] The only two parties opposing forbearance (NCRA and the State of California, which has not petitioned for reconsideration) supplied little contrary evidence.

Second, the Commission also properly found that the remedial provisions of Sections 201, 202 and 208, which are explicitly directed at unreasonable rates and practices, were sufficient to protect consumers against those practices. (Order at ¶¶ 176-77.) Nothing in the record undermines the Commission's Section 332(c)(1)(A)(ii) finding. There was no evidence that these remedies were inadequate, or as to how tariff filings would provide protections to subscribers that these provisions do not already supply. To the contrary, the record showed "sufficient competition in this marketplace to justify forbearance." (Order at ¶ 175.) The fact is that competition has occurred without Commission enforcement of tariff obligations for most of the industry's history and also without tariff regulation by other than a few states. The Commission correctly found that there was no necessary link between enforcing tariff obligations and ensuring that consumers could be protected.

Third, the Commission made detailed findings that forbearance was in the public interest, meeting the third prong of the Section 332(c)(1)(A) test. (Order at ¶ 177.) It found that tariffs can actually contribute to higher prices and harm competition by,

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9/ Affidavit of Dr. Jerry A. Hausman, concluding that tariff regulation "would likely lead to higher prices for consumers and would definitely lead to a decrease in the rate of technological advance in mobile telecommunications services." Dr. Hausman reported his econometric study which demonstrated that cellular rates were actually higher in states with tariff regulation. Bell Atlantic Reply Comments, Appendix 1.

among other things, impeding incentives for competitive price discounting, encourage manipulative pricing, and discourage new service offerings. Again, the record is barren of any contrary data or information which contradict the Commission's findings on the public interest factor, and neither NCRA nor MCI attempt to undermine those specific findings now.

NCRA claims, however, that the Commission "fundamentally misapplied the Budget Act's forbearance test" (Petition at 13-15). NCRA completely misreads the Order. It seizes on a single sentence in the overview section (¶ 17), wrongly asserting that this was the only forbearance finding the Commission made. NCRA then charges that this sentence, by referring only to a balancing of the costs and benefits of tariffing, failed to make the findings required by Sections 332(c)(1). As noted above, however, the Order did analyze each of the statutory factors and made record-based findings on each one -- findings NCRA pretends does not exist. The Commission explicitly found that tariff enforcement was not necessary to protect consumers against unreasonable rates and practices (Order at ¶¶ 174-75). That finding was independent of the Order's later findings as to the costs and harms of tariff regulation (¶ 177). It is not the Commission which has misread the statute; it is NCRA which has misread the Order.

NCRA next "questions the appropriateness of the Commission's forbearance decision in the absence of any effort to seek comment on the scope of the considerations relevant to the application of each factor" (Petition at 13 n. 23). Again, NCRA simply ignores the Commission's own actions to suit its argument. The Notice of

Proposed Rulemaking in this proceeding explicitly referred to each prong of the Section 332(c)(1) test, and requested comment on each one. (NPRM at ¶ 60).[10/]

MCI also erects straw men, charging that tariff forbearance was based on the assumption that all CMRS providers are "non-dominant carriers," then pointing out that cellular carriers have not been found non-dominant. (Petition at 3.) In fact, the Commission expressly recognized that cellular carriers had been classified as dominant. (See, e.g., Order at ¶ 145.) In any event, its decision to forbear was not required to be based on a finding that these carriers were non-dominant as that term has been used in other contexts. Rather, it was based on the finding that, even assuming cellular carriers possessed market power, the cellular market was sufficiently competitive that tariffs were not necessary under the Section 332(c)(1)(A) standard. MCI misses the essential point that the concept of dominance is entirely distinct from the statutory test for forbearance.[11/]

10/ In its own comments in this proceeding, NCRA stated that it "does not take issue with forbearance of retail rate regulation" but requested only that wholesale tariffs be filed. (Comments at 17.) The record showed why that request was unwarranted. The state commission findings and Dr. Hausman's conclusions, for example, explicitly addressed the lack of need for, and potential harms of, wholesale tariffs. In its Petition NCRA now changes its tune and challenges all forbearance, but its arguments are no more convincing now.

11/ It can also be argued that the very concept of "dominance" is no longer relevant at all to the mobile services industry, given Congress's restructuring of the Act's regulation of mobile services. At a minimum, however, it is clear that whether or not some degree of market power exists is not germane to whether forbearance of a Title II provision is warranted. The Commission found that competition was "sufficient" to warrant forbearance (Order at ¶ 175), and in doing so it met the statutory test.

MCI finds fault with the Order's forbearance as to access tariffs, complaining that the record is insufficient to support this determination. (Petition at 7-11.) There is, however, no material distinction between "access" and "service" tariffs for purposes of the forbearance analysis. Access tariffs merely address a specific form of service which is available to access customers, whether they are resellers or end users. And, since the Commission itself has never required access tariffs as separate from service tariffs, there is no existing regulatory requirement which would now be removed by the Order.[12/] The Commission's findings under the three-part test of Section 332(c)(1)(A), that tariffs serve no purpose of protecting consumers and may actually harm competition, apply equally to access tariffs, and MCI offers no reason as to why they should not. Moreover, in all of the state proceedings of which Bell Atlantic is aware, no regulatory commission has distinguished between access tariffs and service tariffs in reaching its determinations that tariff regulation is unwarranted.

MCI's argument on access tariffs is untimely in light of its failure even to raise this at all in the comment rounds of this proceeding. In addition, when the shoe is on the other foot, and the issue is MCI's own tariff obligations, it has argued for

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12/ The fact that such tariffs are filed by BOC-affiliated cellular carriers is a creature of their obligations under the Modified Final Judgment, not of any Commission finding that such tariffs should be filed. In fact the Commission previously determined that cellular carriers were not required to file access tariffs. Letter of Gerald Brock, Chief, Common Carrier Bureau, dated October 18, 1988. The Order is consistent with the Commission's long-held position.

freedom from tariffs. Cf. AT&T v. MCI, 978 F.2d 727 (D.C. Cir. 1993). It is also worth noting that, in its appeal to the Supreme Court of the Section 203 tariff issues raised in that case and related litigation, MCI strenuously advocated "substantial deference" to the Commission's broad authority to determine whether and how to enforce tariffing:

> Where, as here, Congress has not merely left an issue open, but has expressly delegated discretion to the agency, deference is at its zenith. . . .
>
> The Commission's interpretation . . . should be given the substantial deference generally afforded the Commission's regulatory efforts to advance the public interest objectives of the Communications Act. . . .
>
> Because determination of the most effective means of enforcing the Act's substantive standards 'necessarily requires significant expertise, and entails the exercise of judgment grounded in policy concerns . . . , courts appropriately defer to the agency entrusted by Congress to make such policy determinations.' This exercise of delegated power under a highly technical statutory and regulatory scheme must be upheld absent compelling indications that it is wrong.

MCI v. AT&T, No. 93-356 (S.Ct.), Brief of MCI at 20, 24, 26 (citations omitted). MCI is now unwilling to grant the Commission the same deference that it has recently advocated, even though the Commission's authority to forbear is now explicitly granted to it by Congress.

In any event, MCI's objections are mooted by the Commission's commitment to reexamine access tariffs. (Order at ¶ 179.) MCI presents no facts as to why the maintenance of access tariffs on file, and the attendant burdens these tariffs impose on carriers, should remain in place pending the outcome of that proceeding. The need for forbearance is, in fact, particularly acute for access tariffs because only some CMRS providers must file them.

Requiring them from those carriers would undercut the primary objective of regulatory symmetry.

While NCRA and MCI raise these and a few other objections,[13/] they never grapple with the central thrust of the Order -- its finding that the record supported forbearance from Section 203. They fail to challenge the underlying factual record which buttressed the Commission's decision to forbear from tariffing, but rely only on conclusory assertions such as MCI's claim that the Order's findings "are not supported by substantial evidence" (Petition at 5). Nor do they challenge the Commission's detailed findings as to the competitive harm that can flow from filing tariffs, and the burdens on carriers and the Commission which a tariff system imposes (Order at ¶ 177). The plain fact is that the record is devoid of any data or information which demonstrates why filing tariffs is necessary to guard against unreasonable rates or protect consumers. NCRA's and MCI's petitions should be denied.

13/ NCRA makes other erroneous claims, for example, that Congress established a "clear and unequivocal showing" standard which the Commission must meet before it can forbear. (Petition at 14.) Nothing in the Act or its legislative history sets such a standard; to the contrary both the Act and committee reports leave the Commission with substantial discretion to make forbearance determinations. Similarly, NCRA asserts that the Commission found that cellular carriers "can tacitly agree to noncompetitive pricing," then uses that assertion to criticize its forbearance decision. (Petition at 16.) But the Commission never made such a finding, noting merely that, in general, duopolists may be able to engage in anticompetitive conduct but that there were reasons that would discourage cellular carriers from doing so. (Order at ¶ 146.)

III. THE INTERCONNECTION ISSUES RAISED ON RECONSIDERATION CAN BE FULLY ADDRESSED IN NEW CC DOCKET NO. 94-54.

The largest number of petitions for reconsideration object to the section of the Order addressing interconnection. NARUC and the State of New York object to the statement that if the Commission requires interconnection by all CMRS providers, it has the authority to preempt state regulation of interconnection rates. (Order at ¶ 237.) NCRA and two resellers, Cellular Service, Inc. and ComTech, Inc., demand that the Commission immediately order CMRS providers to interconnect with resellers.

None of these petitions need to be addressed on reconsideration, nor should they be. The Order, properly recognizing the complexity of interconnection issues and the need to develop a more thorough record on those issues, committed to begin a new rulemaking to examine them in depth. The Commission has made good on that commitment. Its June 9, 1994 adoption of the CMRS Equal Access/Interconnection NPRM[14/] made clear that the new proceeding would involve a comprehensive evaluation of numerous interconnection issues, including specific concerns raised by resellers. Since the Commission has now taken up those issues in a proceeding specially devoted to them, the Commission should not commit its

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14/ "FCC Seeks Comment on Requiring CMRS Providers to Provide Equal Access; Examines LEC Provision of Interconnection to CMRS Providers; Begins Inquiry into Interconnection Obligations of CMRS Providers." News Release, June 9, 1994, announcing initiation of CC Docket No. 94-54.

resources to addressing them on the limited record developed in the present docket.[15/]

Cellular Service and ComTech claim, without factual support, that they cannot wait for the Commission to address the specific issue of reseller right to interconnection. Their pleas of urgency ring hollow given that neither bothered to submit comments on interconnection or any other issue in the comment phase of this proceeding. In any event, their concern (Petition at 14) that the interconnection rulemaking will be deferred to "some later and unspecified date" has been mooted by the Commission's adoption of the CMRS Equal Access/Interconnection NPRM.

The resellers also wrongly presume that interconnection is a simple issue which can be immediately resolved on the existing record. In fact, the present record contains virtually no information on which the Commission can make the Section 201 findings which the resellers themselves recognize are a prerequisite for ordering interconnection. (Cellular Service Petition at 6-7.) Cellular Service spends pages of its reconsideration petition attempting to show why granting it a right of interconnection to CMRS carriers would be in the public interest. This is the kind of information which the Commission has called for in the CMRS

15/ NARUC agrees that, since the Commission had announced its intent to begin a new interconnection rulemaking, NARUC's preemption concern "does not appear . . . ripe for reconsideration," and thus merely asks that the Commission "clarify that preemption remains one of the issues that can be addressed" in the new rulemaking. (Petition at 7.)

Equal Access/Interconnection NPRM. But it is improper in a petition for reconsideration.[16/]

Moreover, the resellers gloss over the complex issues which must be resolved as to, for example, precisely what types of interconnection are appropriate, what contractual arrangements are to be required, whether certain types of interconnection may in fact prove destructive to competition, whether merely providing a switch makes a reseller "facilities-based," whether the costs of interconnection are justified by benefits, and how enforcement is to be accomplished. The Commission's decision to defer these issues to a separate proceeding was fully justified, and also well within the agency's discretion as to the most orderly way in which to conduct its rulemakings.

The resellers are also wrong in claiming that new Section 332 of the Act compels the Commission to order CMRS providers to interconnect with resellers. To the contrary, Section 332 is explicitly made subject to Section 201, which leaves interconnection determinations to the Commission. The resellers would have the Commission's discretion to adopt interconnection rules best suited for the particular communications services at issue stripped away, and interconnection simply ordered without the development of any record. That action would not only be contrary to years of Commission precedent in developing interconnection

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16/ Section 1.429(b) of the Commission's Rules disfavors a "petition for reconsideration which relies on facts which have not previously been presented to the Commission" where the facts could have been presented during the comment period. That is certainly the case here.

policy but would be premature based on the minimal record on interconnection issues.

In short, the Commission has now begun precisely the rulemaking that the resellers' petitions request. Their petitions can thus be dismissed.

IV. RULES FOR THE STATE PETITION PROCESS SHOULD NOT BE CHANGED.

Two petitions for reconsideration challenge the new rules governing state petitions to retain or adopt regulations on CMRS rates. Section 332(c)(3) permits a state to petition for this authority based on a showing that (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates that are unjustly or unreasonably discriminatory," or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." The Commission may then grant "such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory." Id.

The Order adopts rules that define the showing a petitioning state must meet in words which track the statute almost verbatim (Section 20.13(a)(1)), and that require the state to describe the rate regulations the state proposes to establish if the petition is granted (Section 20.13(a)(4)).

The Pennsylvania Public Utility Commission (but no other state) argues that these rules misread Section 332(c)(3) in two

respects. First, it contends that a petition should be granted even if it is based only on a showing that mobile services have become a substitute for telephone service. This is not, however, what the statute says -- it also requires a showing that market conditions are inadequate to protect consumers.

Pennsylvania's position was previously advanced by the District of Columbia Public Service Commission (which has not sought to press its argument on reconsideration). The Order rejected it, finding that a demonstration of market conditions was essential to granting a state petition. In addition to relying on the plain language of Section 332(c)(3), the Order pointed to legislative history, which stated that the mere fact that several companies offered wireless service as a means of providing basic telephone service did not entitle states to regulate those companies. (Order at ¶ 253.)

The Commission correctly implemented the precise language of the statute. Its action also serves the overall purposes of Section 332, which permits CMRS rate regulation as a backstop only where competitive conditions are inadequate to protect consumers against unjust or unreasonable rates. Under Pennsylvania's reading of the Act, that test would be read out of Section 332.

Pennsylvania (joined by the National Association of Regulatory Utility Commissioners) also objects to Section 20.13(a)(4)'s requirement that a petitioning state provide the existing or proposed rules that it wishes to impose on CMRS providers. These petitioners argue that it would be burdensome for a state to draft such rules prior to filing a petition. The short answer is that

the Commission could not possibly make the determination Section 332 requires it to make without having the rules before it. It could not determine what authority is "appropriate" in a vacuum; it would need specific proposed rules to consider whether "such authority" is what is "necessary to ensure that rates are just and reasonable." Section 332(c)(3). The Act calls on the Commission to make a particularized finding of the need for specific regulation, and it cannot discharge that obligation without knowing what regulation a state wants to impose.

The alleged burden on states mentioned by NARUC is also not apparent. States which seek to retain existing rules can of course simply provide them to the Commission. In the case of a state which seeks to impose rules, NARUC speculates that rules would have to be formally adopted before they could be presented to the Commission. Nothing in Section 332 requires this, however, and Section 20.13(a)(4) expressly permits the submission of proposed rules. Preparation of the petition to the Commission must, under the petition process, contain specific information about the market conditions for mobile services in that state (information which neither NARUC nor Pennsylvania object to having to provide). In that effort, it would hardly be burdensome for the state to explain what rules it intends to adopt to protect consumers.

Pennsylvania also asks that the new rules be expanded to provide for "state access to the information required by the statute to assess market conditions . . ." (Petition at 6). It proposes no such provision, however, and there is no basis in

Section 332 for the Commission to embark on that ambiguous and open-ended effort.

For these reasons, the petitions challenging the state petition process rules should be denied.

CONCLUSION

None of the petitions for reconsideration challenging the Order's actions on the definition of CMRS, forbearance, interconnection or the state petition process presents any legal basis for changing the Commission's determinations. These petitions should be promptly denied, so that the Commission can focus on the follow-on rulemakings to achieve true regulatory symmetry in the mobile services industry.

Respectfully submitted,

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